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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 493

NEW YORK HANDKERCHIEF MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. III, 36–45) is reported in 114 F. (2d) 144. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 257–295) are reported in 16 N. L. R. B. 532.

JURISDICTION

The decree of the court below (R. III, 51–53) was entered on October 2, 1940. The petition for a writ of certiorari was filed on October 8, 1940. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board, in a proceeding under Section 9 of the National Labor Relations Act to determine representation for purposes of collective bargaining, may validly certify as the exclusive representative of the employees in an appropriate unit a labor organization which received a majority of the votes cast in an election held by the Board, even though, as a result of the employer's unfair labor practices, less than a majority of the eligible employees participated in the election.[1]

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[1] The petition seeks to present a second question (Pet. 2, 9–10), but we are unable to discern precisely what it is. Apparently petitioner asserts either that a discriminatory discharge of employees violates the Act only if a bargaining representative has been theretofore certified, or that a labor organization cannot file a charge under the Act until it has been certified as bargaining representative, and that it can complain only of acts subsequent to its certification. If these are petitioner's contentions, they are wholly insubstantial. Section 8 (3) of the Act prohibits discriminatory discharge without regard to whether a bargaining representative has been designated by a majority of the employees or certified by the Board. And nothing in the Act suggests that only a bargaining representative can file a charge. Article II, Section 1, of the Board's Rules and Regulations provides that a charge may be filed by any person or labor organization.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are as follows:

> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> * * * * *
>
> (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives.
>
> (d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection

(c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

STATEMENT

On November 24, 1937, the International Ladies Garment Workers Union, hereinafter called the Union, filed with the Board a petition for investigation and certification of collective bargaining representatives for petitioner's employees, pursuant to Section 9 of the Act (R. I, 403–404). After a hearing before a trial examiner participated in by petitioner and the Union (R. I, 439–500), the Board, in February 1938, issued its Decision and Direction of Election (R. I, 36–39). The Board found (1) that a question affecting commerce had arisen concerning the representation of petitioner's employees; (2) that petitioner's production and maintenance employees, exclusive of clerical and supervisory employees, constituted a unit appropriate for the purposes of collective bargaining; and (3) that the question concerning representation could best be resolved through an

election by secret ballot, wherein the employees in the appropriate unit could determine whether or not they desired to be represented by the Union. Accordingly, the Board directed that such an election be conducted by its Regional Director (R. I, 39).[2]

The election was held on March 24, 1938, at Chicago, Illinois (R. I, 520). Thereafter the Regional Director issued his "Intermediate Report on Secret Ballot" in which he advised the Board that of the approximately 225 employees eligible to vote, 56 had voted and that 53 votes were cast for and 3 against the Union; that the agents of the Board conducting the election had observed surveillance of the voting place by petitioner's officials; and that various employees had filed with the Regional Director affidavits which set forth various acts of interference and coercion by petitioner which deterred them from going to the polls (R. I, 519–527). The Regional Director recommended that, since the smallness of the vote was attributable to petitioner's interference with freedom of the election,

[2] On March 22, 1938, petitioner filed in the court below a petition to review, set aside, and stay enforcement of the Direction of Election. On March 23, 1938, the court declined to issue a restraining order (R. I, 521). Subsequently, the petition was dismissed as premature by consent of all parties. *New York Handkerchief Manufacturing Company* v. *National Labor Relations Board*, 97 F. (2d) 1010 (C. C. A. 7).

and since the Union received a majority of the votes cast, the Union should be certified as the exclusive representative (R. I, 523–524). Petitioner filed exceptions to this Report (R. I, 529–531). On June 1, 1938, upon consideration of the Intermediate Report and exceptions thereto, the Board certified the Union as the exclusive representative of the employees within the appropriate unit (R. I, 41–43).

On June 24, 1938, the Board, upon charges and amended charges filed by the Union pursuant to Section 10 of the Act (R. I, 23–25), issued a complaint against petitioner alleging that petitioner had refused to bargain collectively with the Union despite the latter's certification by the Board as the exclusive representative of the employees; that petitioner had discharged certain employees and decreased the amount of work of others because of their union activities; and that by these and other acts petitioner had engaged and was engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. I, 18–23). After the usual procedural steps,[3] the Board, on October 26, 1939, issued its Decision and Order against petitioner (R. I, 257–295). Insofar as here material, the facts as found by the Board and

[3] I. e., answer by petitioner (R. I, 26–32), hearing before a Trial Examiner, Intermediate Report (R. I, 223–242), exceptions thereto by petitioner (R. I, 243–254), and oral argument and filing of briefs with the Board.

as shown by the evidence may be summarized as follows:[4]

Petitioner manufactures and sells handkerchiefs and is extensively engaged in interstate commerce (R. I, 260–261; II, 1–3). In November 1937, as a consequence of petitioner's refusal to meet with it, the Union petitioned the Board for certification; thereupon Meiselman, petitioner's secretary, called a meeting of all the employees in the plant, inveighed against the Union, and questioned various employees concerning their membership (R. I, 261–263; II, 35, 48, 72, 78, 79, 96, 137, 148, 164, 167, 170, 174, 176, 180, 184, 186, 187, 190, 208, 216, 237–238, 269–271). On the morning of the election ordered by the Board, Meiselman told employees, "Don't vote. You don't have to vote. If I can keep 100 girls from going down there and voting, there won't be anything to it and they will leave us alone and won't bother us any more" (R. I, 264; II, 180–182). On the same day a petition stating that "the girls were satisfied with wages and conditions and begged that the officers and officials would do something to protect them from outside interference" was circulated in the plant during working hours for signature by the employees (R. I, 264–265; II, 265–266). Forelady Marshall presented the petition to the girls working under her for their signature (R.

[4] In the following statement, the references preceding the semicolons are to the Board's findings and the following references are to the supporting evidence.

I, 265–266; II, 36–37, 49–50, 59, 72, 118, 198). Meiselman was present during the circulation of the petition (R. I, 265; II, 37, 49–50, 80–81, 90, 118, 125, 181, 187, 210, 305, 335, 337). Lewis, an employee acting under Meiselman's instructions, informed employees who hesitated to sign that Meiselman had instigated the petition and that "Whoever didn't sign that list wasn't going to work for him no more" (R. I, 265; II, 49, 131, 198). Employees who signed the petition were told by Forelady Marshall and by Lewis that it was not necessary for them to participate in the election since the petition was equivalent to a vote against the Union (R. I, 266; II, 37, 72–73, 198). During the election, Lewis, at Meiselman's direction, stood in front of the polling place observing those who came to vote and telling them not to take part in the election if they intended to vote against the Union (R. I, 266–267, 269; II, 38, 59, 73, 90–91, 133–134, 198–199, 306–308). Three of petitioner's executives and a foreman stationed themselves near the polls (R. I, 266–269; II, 3, 245, 289–294). The Board found that their presence was intended to and did have the effect of restraining the employees from exercising their franchise (R. I, 269).

Nine employees who voted were discharged as soon as they returned to work after the election, with the bald explanation that petitioner had no work for "voters" (R. I, 273–274, 279, 287–288; II, 35–36, 38–40, 50–52, 57, 59–60, 71, 73–74, 111–113, 118, 122, 131, 147–150, 196, 198–200). Following

the Board's certification of the Union as the exclusive collective bargaining representative, petitioner refused to meet with the Union and did not reply to the Union's letters requesting collective bargaining (R. I, 270–271; II, 5, I, 43–44).

The Board found that by the foregoing acts petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. I, 291–292). The Board's order required petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union, to offer reinstatement with back pay to seven named employees, to make whole four other employees for pay lost by reason of petitioner's discrimination, and to post appropriate notices (R. I, 292–294).

On November 28, 1939, petitioner filed in the court below its petition to review and set aside the Board's order (R. III, 1–12); the Board requested enforcement (R. III, 14–19). On July 11, 1940, the court handed down its decision enforcing the Board's order, with a single modification not here in issue (R. III, 36–45). A decree was entered accordingly on October 2, 1940 (R. III, 51–53).

ARGUMENT

The court below held that the Board properly certified the Union [5] upon the basis of a majority of

[5] The validity of the Board's certification was, of course, an issue before the court in the proceeding for review or enforcement of the Board's order directing petitioner to bargain with the Union. Section 9 (d); *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459.

votes cast in an election in which less than a majority of the eligible employees participated; it correctly accepted as controlling the principles announced by this Court in construing a similar provision of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515.[6] This Court there upheld a certification by the Railway Mediation Board based upon an election in which a majority of the eligible employees voted, and the union certified obtained a majority of the votes cast but less than a majority of the votes of all of those eligible to vote. The Court stated (300 U. S. at 560):

> Section 2, Fourth, of the Railway Labor Act provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified

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[6] See, also, *Association of Clerical Employees, etc.* v. *Brotherhood of Railway and Steamship Clerks,* 85 F. (2d) 152 (C. C. A. 6); *Nashville, C. & St. L. R. R.* v. *Railway Employees Department, etc,* 93 F (2d) 340 (C C. A. 7); *Matter of R. C. A. Mfg. Co., Inc.,* 2 N. L. R. B. 159, 173–178.

> majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. [Citing cases.] Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." [Citing cases.]
>
> We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. * * *

The legislative history establishes that the principle of "majority rule" enacted in Section 9 (a) of the National Labor Relations Act was intended to be the same as that which had been prescribed in the Railway Labor Act.[7]

The circumstance that in the *Virginian Railway* case a majority of those eligible to vote participated in the election is not material. The rule governing political elections, upon which the Court relied and which Congress had in mind in establishing majority rule under this Act (note 7, this page), makes no distinction based upon the number of participants. In *Carroll County* v. *Smith,* 111 U. S. 556, cited by this Court in the *Virginian Railway* case, only about one-third of those eligible to vote participated, but it was held that the statutory provi-

[7] Senate Report No. 573 (74th Cong., 1st Sess.), p. 13; House Report No. 1147 (74th Cong., 1st Sess.), pp. 21–22. These reports also appear to envisage the political rule, in pointing out that the majority rule principle was sanctioned by "governmental practices" and "democratic institutions." Report No. 573 at p. 13; Report No. 1147 at p. 21.

sion requiring the assent of two-thirds of the qualified voters had been satisfied. In *St. Joseph Township* v. *Rogers,* 16 Wall. 644, where only a minority of those eligible to vote participated, this Court held (p. 664) that "the legislature in adopting the phrase 'a majority of the legal voters of the township' intended to require only a majority of the legal voters of the township voting at the election."

The Court further pointed out in the *Virginian Railway* case, as a reason for applying the political election rule to elections to designate bargaining representatives, that (p. 560): "There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer." The wisdom of this observation is illustrated in the present case and the Board's ruling is supported by the findings, uncontested here, that petitioner restrained its employees from voting.[8] If an em-

[8] Application of the political rule in Board elections has other salutary effects. In discussing the applicability of the *Virginian Railway* rule to balloting under the Agricultural Adjustment Act (7 U. S. C. A. § 608 c (8) and (9)), one commentator has stated: "Of the rule in political elections it may be said that political life would be crippled if absolute majorities were required. Perhaps, the exigencies of political life do not apply with the same force in a field where the effect of the proposed regulation is to set up a special and exceptional system. But a holding that a majority of those voting suffices, even where a majority has not taken part, does have important advantages. It requires all those opposed to register their vote. Thus it promotes

ployer may, by coercing a majority of his employees to boycott an election held by the Board, render the election nugatory, it is apparent that the Act's purpose to foster the practice and procedure of collective bargaining (Section 1) will be frustrated. Furthermore, the secrecy of the ballot, contemplated by Section 9 (c), was here destroyed by petitioner's surveillance of the polling place, taken together with its instructions to its employees to refrain from voting if they opposed the Union. In the special circumstances here presented the Board's certification was the only result consistent with making the statute workable and with denying effect to conduct flatly violative of its policies and prohibitions.

CONCLUSION

The general question presented is of rare incidence in the administration of the Act,[9] and the

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responsibility and insures a more acceptable disposition of the issue than a rejection based on failure of participation. Also it makes it unnecessary to determine the whole number of eligibles and avoids the possibility that a plan may be upset because of incomplete census." Louis L. Jaffe, *Law Making by Private Groups*, 51 Harvard Law Rev. 201, 246 (1937). See, also, *Selection of Employee Representatives Under the Wagner Act*, 32 Illinois Law Review, 593, 609–610 (1938).

[9] In only 23 elections held by the Board up to November 1, 1940, have a majority of the eligible employees failed to vote. In a statistical report (Labor Board Release No. R–3533, September 2, 1940) on its work during the 61 months of operation terminating August 31, 1940, the Board stated that "There were 3,370 elections held in which 1,224,536 valid

decision below is in any event correct upon the special features of this case. There is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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NOVEMBER 1940.

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votes were cast. About 90 percent of all employees eligible to vote in Board elections actually cast ballots." Where employer coercion is absent and yet the percentage of employees voting is very small, the Board may well so exercise its discretion as to refuse certification.

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